IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

NICHOLAS T. LEGER as PERSONAL REPRESENTATIVE for the ESTATE OF MICHAEL THOEMKE and DANIEL THOEMKE, individually

Plaintiffs,

v.

PNICHOLAS T. LEGER as assignee of PRESBYTERIAN HEALTHCARE SERVICES

Defendant and Third-Party Plaintiff-Appellee.

v.

RICHARD GERETY, M.D. and NEW MEXICO HEART INSTITUTE,

Third-Party Defendants-Appellants.

Case No. 35,807

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
SAN MIGUEL COUNTY

THE HONORABLE GERALD BACA
DIST. CT. NO. D-412-CV-2012-328

BRIEF IN CHIEF

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This appeal stems from the medical malpractice lawsuit filed by Nicholas T. Leger as Personal Representative for the Estate of Michael Thoemke and Daniel Thoemke, Individually (collectively referred to as "Plaintiffs") against Presbyterian Healthcare Services (the "Hospital") for negligence resulting in the death of patient Michael Thoemke.

Plaintiffs alleged that negligence of the Hospital's employed physicians, nurses, and administrators caused the death of Michael Thoemke. Plaintiffs further alleged that Appellant Dr. Gerety, a surgeon not employed by or based at the Hospital, was negligent. Plaintiffs did not join Dr. Gerety, but alleged that the Hospital was liable for his negligence. The Hospital filed a third-party complaint against Appellants Dr. Gerety and his employer New Mexico Heart Institute (NMHI) for indemnity. Shortly thereafter, Plaintiffs moved for an order to sever or bifurcate and stay the Hospital's indemnity claim against Appellants. The district court granted the Motion. After two years of litigation, Plaintiffs settled their claims against the Hospital. As a requirement of the settlement agreement, the Hospital assigned its indemnity claim to Plaintiff-Appellee Nicholas T. Leger.

After dismissing the Hospital from the suit with prejudice, Appellee moved

to amend the Hospital's third-party complaint to seek substitution as third-party plaintiff in place of the Hospital. The Motion to Amend was granted, and Dr. Gerety and NMHI filed a Motion to Dismiss the third-party complaint on the grounds that NMSA 1978, Section 41-5-12 (1976) of the Medical Malpractice Act expressly prohibits assignment of the Hospital's indemnity claim, and the assignment is contrary to the common law of New Mexico. The district court denied the Motion, but granted Dr. Gerety's request for interlocutory appeal on the issue.

II. STATEMENT OF FACTS

1. On December 4, 2010, Michael Thoemke passed away during surgery at the Hospital. [RP 1].

2. On July 20, 2012, Plaintiffs filed suit against the Hospital in Cause No. D-412-CV-2012-000328, alleging that the Hospital's employed physicians, nurses, and administrators caused Michael Thoemke's death. [RP 1-10].

3. Plaintiffs also alleged that Dr. Gerety, individually, was an ostensible agent of the Hospital, that Dr. Gerety was negligent, and that the Hospital was liable for his negligent treatment of Michael Thoemke. *Id.*

4. Plaintiffs did not sue Dr. Gerety or his employer, NMHI (both qualified healthcare providers under the New Mexico Medical Malpractice Act).

5. On May 21, 2013, the Hospital, after filing application with the New Mexico Medical Review Commission, filed a Third-Party Complaint against Dr. Gerety and NMHI seeking indemnity. [RP 205-218].

6. Shortly thereafter, Plaintiffs moved for an order to sever or bifurcate and stay the indemnity claim against Dr. Gerety and NMHI ("Motion to Sever"). [RP 243-249]. Plaintiffs convinced the district court and the parties that they had no interest in the indemnity claim, and deliberately chose not to sue Dr. Gerety:

> Plaintiffs have no standing or interest in any post-judgment indemnification claims brought by [the Hospital] against third parties. Rather, Plaintiffs' sole interest in this suit is proving the negligence of [the Hospital], its employees, and its ostensible agents. Plaintiffs have no desire or intent, nor are they required, to wade into the morass that [the Hospital] intends to create by seeking post-judgment indemnification from third parties that may or may not be liable to [the Hospital].

[RP 246-47].

7. Taking Plaintiffs at their word, neither Dr. Gerety nor NMHI opposed the Motion to Sever, [RP 275-79], and the district court severed the two cases, staying the indemnity claim until after trial on Plaintiffs' claims. [RP 452-53].

8. Two years later, on the eve of trial, Plaintiffs settled all of their claims against the Hospital. Plaintiffs represented to the Court that the Hospital paid 100 percent of Plaintiffs' damages, and also assigned to Plaintiffs all of the Hospital's

rights of indemnity against Dr. Gerety and NMHI in consideration for settlement. [RP 2272, ¶ 1].

9. On March 3, 2015, Plaintiffs dismissed their claims against the Hospital with prejudice. [RP 2270-71].

10. Appellee subsequently filed a motion to lift the stay and amend the Hospital's Third-Party Complaint against Dr. Gerety and NMHI for negligence to substitute himself as Third-Party Plaintiff. [RP 2272-75].

11. The district court granted Appellee's Motion, [RP 2354-55], and Appellee filed a First Amended Third-Party Complaint on August 10, 2015. [2356-59].

12. On February 23, 2016, Dr. Gerety and NMHI filed their Motion to Dismiss the First Amended Third-Party Complaint on the grounds that indemnity claims are not assignable under the Medical Malpractice Act ("the MMA") (NMSA 1978, § 41-5-1 et seq.) and the common law, and that Appellee's claims against Dr. Gerety and NMHI are barred by the Statute of Repose. [RP 2691-2701].

13. The district court denied the Motion, but granted the request of Dr. Gerety and NMHI (collectively referred to hereafter as "Dr. Gerety") to apply for interlocutory appeal. [RP 2922-24].

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed by the court de novo. *Christus St. Vincent Regional Medical Center v. Duarte-Afara*, 2011-NMCA-112, ¶ 9, 267 P.3d 70; *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 10, 309 P.3d 1047 ("[w]hether the Legislature intended professional medical organizations like [d]efendants to become qualified 'health care providers' under the MMA presents an issue of statutory construction, which is a question of law that this Court reviews de novo.")

ARGUMENT

Although Plaintiffs told the Court and Dr. Gerety that they had no interest in suing Dr. Gerety, when they settled with the Hospital they either demanded or were forced to accept an assignment of the Hospital's claim against Dr. Gerety and NMHI. This assignment is prohibited by the MMA:

> § 41-5-12 Claims for compensation not assignable.
>
> A patient's claim for compensation under the Medical Malpractice Act is not assignable.

NMSA 1978 § 41-5-12 (1976). Plaintiffs contend that the statute prohibits only patients from assigning their claims—and since the Hospital was not Dr. Gerety's patient, the Hospital was free to sell and assign its claim to whomever it pleased.

The Hospital's claim against Dr. Gerety and NMHI is a malpractice claim governed by the MMA. *Christus St. Vincent Regional Medical Center*, 2011-NMCA-112, ¶¶ 15-16. This is not disputed.

What is here disputed is whether the MMA's prohibition against assignments of malpractice claims only applies to patients, or whether it applies to every person or entity that holds a medical malpractice claim, including hospitals. Every other requirement of the MMA applies to hospitals as well as patients. Nothing suggests that the Legislature intended to prohibit patients—but not hospitals—from selling, exchanging, or assigning their medical malpractice claims. The chart below frames the issue:

Patients	**Hospitals**
Cannot file a medical malpractice lawsuit beyond the statute of repose. NMSA 1978, § 41-5-13.	Cannot file a medical malpractice lawsuit for indemnity beyond the statute of repose. NMSA 1978, § 41-5-13; *Christus St. Vincent*, 2011-NMCA 112.
Cannot file a medical malpractice lawsuit without first obtaining a review of the claim by the Medical Review Commission. NMSA 1978, § 41-5-15.	Cannot file a medical malpractice lawsuit for indemnity without first obtaining a review of the claim by the Medical Review Commission. NMSA 1978, § 41-5-15; *Christus St. Vincent*, 2011-NMCA 112.
Cannot recover more than the statutory limit on damages. NMSA 1978, § 41-5-6.	Cannot recover more than the statutory limit on damages. NMSA 1978, § 41-5-6; *Christus St. Vincent*, 2011-NMCA 112.
Cannot assign a malpractice claim. NMSA 1978, § 41-5-12.	Cannot (or can?) assign a malpractice claim. NMSA 1978, § 41-5-12.

The MMA encourages healthcare providers to obtain liability insurance and, in return, provides benefits and protections. Every time the appellate courts in New Mexico have been asked to apply the MMA in a way that would carve out exceptions to those benefits, the courts have refused, and have instead applied the protections of the MMA in a broad manner in order to implement the intent and purpose of the Legislature. Appellants urge the Court to follow that precedent and hold that the prohibition of assignments of malpractice claims applies to all claims, all claimants, and all assignments, not just assignments by patients.

I. The Legislature did not intend to restrict the application of § 41-5-12 by the phrase "patient's claim for compensation."

Appellee argued below that the prohibition against assignments should be narrowly interpreted to prohibit an assignment only if that assignment is made by a "patient." Appellee's interpretation of the prohibition against assignments assumes that the statute only voids an assignment that is executed by the "patient," and thus would allow assignments by hospitals, personal representatives, conservators, guardians ad litem, family members with loss of consortium claims, or persons injured by patients. Appellee's interpretation is contrary to the plain meaning of the statute and contrary to the legislature's intent and purpose.

A. The term "patient's claim" as used in § 41-5-12 is interchangeable with the term "malpractice claim" for the purposes of the MMA.

The MMA's definition of "malpractice claim" uses the term "patient's claim" interchangeably without distinction:

> "***[M]alpractice claim***" includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the ***patient's claim*** or cause of action sounds in tort or contract . . .

NMSA 1978, §41-5-3(C) (emphasis added). Because the Legislature interchanged these terms in Section 41-5-3(C)—which defines a medical malpractice claim—it is clear the terms have a shared meaning. If the terms have a shared meaning in Section 41-5-3(C), they must also have a shared meaning in Section 41-5-12.

The Legislature intended the term "patient's claim" in Section 41-5-12 to be the equivalent of "malpractice claim," as it is in Section 45-5-3(C). Indemnity claims brought by hospitals against healthcare providers are clearly included within the definition of a "malpractice claim." *See Christus St. Vincent,* 2011-NMCA-112, ¶ 16. An indemnity claim brought by a hospital against a doctor is a "malpractice claim," and governed by the MMA, because the gravamen of the claim is a departure from the standard of care that caused injury to the patient. *Id.* Because the Hospital's indemnity claim against Dr. Gerety and NMHI is a "malpractice claim," and a "malpractice claim" is the equivalent of a "patient's

claim," the Hospital's indemnity claim is a "patient's claim" for purposes of Section 41-5-12. The Hospital's claim was not assignable.

B. The title of § 41-5-12 supports broad interpretation of the Section.

The title of a statute is frequently used by the courts to interpret the Legislature's intent. *State v. Lefthand*, 2015-NMCA-117, ¶ 10; *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 18 ("title of a statute may be used as an aid to construe the statute"); *City of Las Cruces v. David*, 1975-NMCA-044, ¶ 10, 87 N.M. 45; *State v. Richardson*, 1944-NMSC-059, ¶ 21, 48 N.M. 544, 549 ("for the purpose of determining the legislative intent we may look to the title, and ordinarily it may be considered as a part of the act if necessary to its construction"). The title of Section 41-5-12, "Claims for Compensation Not Assignable," does not suggest that only patients are prohibited from assigning claims for compensation; rather, the title states that all claims for compensation are prohibited under the Section.

C. The location of § 41-5-12 within the MMA suggests that the Legislature intended it to protect healthcare providers from the consequences of assignments of all malpractice claims.

Within the MMA, Sections 41-5-6 through 41-5-11 provide limitations on the amount of damages recoverable in all malpractice claims. Section 41-5-12 prohibits the assignment of malpractice claims. Section 41-5-13 limits the time in which all malpractice claims must be brought. Sections 41-5-14 through 41-5-24

require the claimant to submit all malpractice claims to the Medical Review Commission for review by a panel before filing suit, and set forth the procedures for such a review. Because Section 41-5-12 is found within a series of provisions that limit all malpractice claims and protect providers, the location and placement of Section 41-5-12 suggest that the Legislature intended it to limit malpractice claims and protect healthcare providers.

D. An interpretation of § 41-5-12 that would only prohibit assignments by patients would result in an absurd and unintended classification of claims in contravention of the Legislature's intent.

The New Mexico Supreme Court has emphasized that the guiding principle in statutory interpretation is to determine and give effect to the intent of the Legislature. *Quynh Truong v. Allstate Ins. Co.,* 2010-NMSC-009, ¶ 29, 147 N.M. 583, 591 ("Perhaps the most basic principle is that [i]t is the high duty and responsibility of the judicial branch of government to facilitate and promote the Legislature's accomplishment of its purpose.") (internal quotation and citation omitted); *Jolley v. Assoc. Elec. & Gas Ins. Services, Ltd (AEGIS)*, 2010-NMSC-029, ¶ 8, 148 N.M. 436, 438 (to determine intent, court looks to language used and "the purpose to be achieved and the wrong to be remedied"). Thus, a statute is to be interpreted "in light of the harm or evil it seeks to prevent." *United Rentals*

Northwest Inc. v. Yearout Mechanical, Inc., 2010-NMSC-030, ¶¶ 9, 17, 148 N.M. 426, 430, 431.

Under Appellee's interpretation of the MMA, Section 41-5-12 would only prohibit assignments of claims brought by patients, but not assignments made by any other type of plaintiff, such as a hospital, personal representative, guardian ad litem, husband, wife, child, motorist, or person injured by a patient. *See* NMSA 1978, § 41-5-12. Appellee's narrow interpretation of the statute conflicts with how the appellate courts have consistently interpreted the Medical Malpractice Act.

The appellate courts of New Mexico, in interpreting the Medical Malpractice Act, have consistently avoided interpretations that would result in unreasonable classifications. *Christus St. Vincent Regional Medical Cente*r, 2011-NMCA-112, ¶¶ 9, 15-16; *see also, e.g. Willis, M.D. v. Board of Regents of the Univ. of New Mexico, et. al.*, 2015-NMCA-105, ¶ 21 ("the object of statutory interpretation is to construe its terms according to their 'obvious spirit or reason,' not to interpret its terms in a way that would lead to an absurd or unintended result.") Rather, the appellate courts seek to interpret the Medical Malpractice Act in a way that promotes the legislature's desire to regulate the tort liability of medical professionals for acts of medical malpractice. *Wilschinsky v. Medina*, 1989-NMSC-047, ¶ 26; *Christus St. Vincent Regional Medical Center*, 2011-NMCA-

112, ¶¶ 9, 15-16; *Baker v. Hedstrom*, 2013-NMSC-043, ¶¶ 15-21. These cases are each addressed below.

Wilschinsky v. Medina, 1989-NMSC-047

In *Wilschinsky*, a physician allegedly committed medical malpractice by allowing a patient to leave his office under the influence of medication. The patient caused a vehicular collision that injured another motorist. The injured motorist sued the physician, and contended that his claim was not governed by the MMA. The motorist pointed to the definition of a "malpractice claim" found in the MMA, which reads:

> "malpractice claim" includes every cause of action...against a health care provider for medical treatment...which proximately results **in injury to the patient**....

NMSA 1978 § 41-5-3(C) (emphasis added). The motorist argued that he was not suing the physician for "injury to the patient," and that his lawsuit was, therefore, beyond the scope of the MMA.

The Supreme Court held that the motorist's claim was governed by the MMA, even though the claim fell outside the language in the definition. *Id.* at ¶ 22. ("[u]nder principles of narrow construction, generally we would find that this cause of action [automobile accident victim suing physician of driver] is not covered by the definitional section and is therefore outside the Act"). The Court found that the legislature intended the MMA to cover all causes of action based on

acts of medical practice, regardless of whether they were brought by a patient or third party. *Id.* at ¶ 26. It declared unreasonable any interpretation of the statute that would leave an injured patient with a limited recovery, but an injured non-patient, such as the motorist, with an unlimited remedy for the same act of malpractice by the physician. *Id.* This, the Legislature could not have intended.

***Christus St. Vincent Regional Medical Center*, 2011-NMCA-112**

In *Christus St. Vincent Regional Medical Center*, the Court of Appeals rejected another attempt to side-step the MMA. The hospital was sued for malpractice allegedly committed by doctors treating the patient at the hospital. The hospital filed a third-party complaint against the doctors for indemnity. The doctors moved to dismiss, arguing that the indemnity claim was a "malpractice claim" governed by the MMA, and that the third party complaint was time barred by the statute of repose in the MMA. The hospital contended that indemnity claims are not "malpractice claims." The district court disagreed, and dismissed the hospital's third party claims.

The Court of Appeals, in addressing whether the MMA should apply to indemnity claims, stated that "the Legislature intended that the term 'malpractice claim' be construed broadly." *Id.* at ¶ 15. An indemnity claim is construed as a malpractice claim under the MMA because the "gravamen" of the Medical Center's indemnity claim was founded on the allegation that the doctors were

negligent. *Id.* In other words, the hospital's indemnity claim exposed the doctors to the identical liability to which they would have been subject if the plaintiffs had sued them. *Id.* at ¶ 16. "To permit Medical Center's claim to proceed where [plaintiff would be time-barred] would, in our view, elevate form over substance and frustrate the underlying concerns which motivated our Legislature to enact the MMA . . ." *Id.* Thus, the Court ruled that the Medical Center's "equitable indemnification claim is a malpractice claim as that term is used in the MMA," and is, therefore, time-barred by the MMA's statute of repose. *Id.*

***Baker v. Hedstrom*, 2013-NMSC-043**

In *Baker v. Hedstrom*, 2013-NMSC-043, 309 P.3d 1047, the Court held that claims against physicians' professional corporations are governed by the MMA, even though such corporations do not fit the literal definition of "health care providers" in the MMA. The plaintiffs argued that the Legislature did not intend professional corporations to be covered by the MMA because "the plain language of the definition of 'health care provider' expressly exclude[d]" such corporations. *Id.* at ¶ 14. The MMA defines "health care provider" as:

> A person, corporation, organization, facility or institution licenses or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant.

NMSA 1978, § 41-5-3(A). The plaintiffs argued that the term "health care provider" does not include "practice group business entities and professional corporations." After considering the effect and purpose of the MMA, the Court held that such entities qualify as "health care providers" under the MMA, and stated, "we can discern no reason why the Legislature would intend to cover individual medical professionals under the Act while excluding the business organizations they operate under to provide health care." *Id.* at 21, 40.

In each of these cases, the courts rejected an unduly narrow and literal reading of the MMA, because to have done otherwise would have been contrary to the intent of the statute and deprived the defendant doctor of the benefit the legislature intended to provide.

If Section 41-5-12 were interpreted to prohibit assignments only by patients, such an interpretation would result in an "absurd or unintended result." For example, neither of the Plaintiffs in the underlying case (Mr. Leger nor the father, Mr. Thoemke) were the "patient." Without question, an attempt by either Mr. Leger or Mr. Thoemke to sell, convey, or otherwise assign their medical malpractice claim would be contrary to the Legislature's intent to protect health care providers from the selling or assigning of claims against them. Likewise, it would be contrary to the Legislature's intent if Mr. Wilchinski (a non-patient motorist) could assign his "malpractice claim" against the defendant doctor, but the

doctor's patient could not assign her claim. The same is true for the indemnity claim held by the Hospital. Such an indemnity claim is, without question, a "malpractice claim" and is covered by all of the regulatory aspects of the act, including the statute of repose, the limitation of liability, and the prerequisite of presenting the claim to the medical review commission. It is equally governed by the non-assignability provision in Section 41-5-12.

An interpretation of the Act that would apply all of these regulations to the Hospital's claim, but not the prohibition against assignment, would be illogical and unreasonable and again would lead to both an "absurd or unintended result" and "unreasonable classification." If one provision of the MMA applies, then all provisions of the Act must apply. Likewise, as qualified health care providers under the Act, Dr. Gerety and NMHI are entitled to all benefits under the Act, including the benefit of non-assignability. This benefit should not be contingent upon who brings the medical malpractice claim—whether it is a driver, patient, hospital, or patient's family member. In the words of the Court in *Christus St. Vincent Medical Center*, to permit the Hospital's assignment to proceed where an assignment by Thoemke/Leger could not, "would, in our view, elevate form over substance and frustrate the underlying concerns which motivated our Legislature to enact the MMA..." 2011-NMCA-112 at ¶ 16.

To illustrate the point, let's assume that a patient sues his surgeon (who is qualified under the MMA) and the hospital at which the surgeon performed a procedure, alleging that the surgeon was an ostensible agent of the hospital. Further assume that the hospital did not timely assert a claim against the surgeon for indemnity. The hospital, clearly, could not take from the patient an assignment of his claim against the surgeon in order to cure the hospital's failure to assert a timely claim for indemnity. No good reason would exist why the patient would be prohibited from making such an assignment to the hospital, but the hospital could make an assignment to the patient in order to cure the patient's failure to make a timely claim against the surgeon.

The same result should be reached under the facts of this case. That it is the Hospital assigning its medical malpractice claim rather than Plaintiffs should make no difference. Both claims are medical malpractice claims and both claims are indisputably covered under the MMA. To hold otherwise, would ignore the legislature's intent and would lead to absurd, unintended results and "unreasonable classifications."

E. Construing § 41-5-12 to allow the Hospital to sell or assign its malpractice claim to Appellee would thwart the purpose of the MMA.

The Legislature's purpose in enacting the MMA was to "promote the health and welfare of the people of New Mexico by making available professional

liability insurance for health care providers in New Mexico." NMSA 1978, § 41-5-2 (1976). The MMA was the Legislature's response to the departure of the only professional liability insurer for doctors in the state. The departure raised legitimate concerns about 1) doctors leaving New Mexico, and 2) patients having no recovery source for injuries caused by doctors' negligence. Thus, the Legislature enacted the MMA to form a mutual insurance company that provided professional liability coverage for qualified health care providers, as well as a recovery source for injured patients. *See* NMSA 1978, § 41-5-1 et seq.; Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L.Rev. 5, 9 n.21 (1976-1977).

Prior to the enactment of the MMA, prohibitive premiums and the unavailability of malpractice insurance resulted from the unpredictability of medical malpractice claims. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale Law Journal No. 7, 1521, 1539-42 (Jun 1987). The less predictable the potential loss, the higher the premium amounts that were charged in order to assure that the insurer could meet its obligation to pay meritorious claims. *Id.* When reasonably accurate predictions became impossible, the insurers' prudent course was to abandon coverage. *See generally* Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 Law and Contemporary Problems 9, n. 11 (Spring 1986). *See also* U.S. Congress, Office of the Technology

Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BP-H-119, p. 64 (Oct. 1993) (jury awards for personal injury of equivalent severity continue to vary enormously and estimates of future damages "involve numerous assumptions, especially for seriously injured patients"); Posner, *Trends in Medical Malpractice Insurance Law*, 49 Law and Contemporary Problems, n.15 at 49-51 (Spring 1986); Kovnat, *supra*, 9, 19 (discussing actuarial difficulties).

In enacting the MMA, the Legislature fashioned specific remedies designed to address such unpredictabilities. *Cummings v. X-Ray Associates of New Mexico, P.C.*, 1996-NMSC-035, ¶¶ 39, 121 N.M. 821, 833 (The MMA was designed to address a much-discussed medical malpractice insurance crisis); *Moncor Trust Co. on behalf of Flynn v. Feil*, 1987-NMCA-015, ¶ 9, 105 N.M. 444, 446 (the MMA was intended to address factors adversely affecting availability and cost of insurance "and to provide incentives for furnishing professional liability insurance").

Specifically, the MMA addressed the malpractice actions filed long after the alleged act of malpractice had occurred. *See Cummings*, 1996-NMSC-035 at ¶¶ 40-41, 121 N.M. at 833. The long "tail" resulting from the discovery rule had led to increases in premiums and health care costs, and to the decrease in the willingness of carriers to provide coverage. Priest, *supra*, 1539-42. The Legislature and the courts both recognized that adopting a specific and certain termination date for

initiating litigation could be achieved by enacting a statute of repose. *See* NMSA 1978, § 41-5-13 (1976) (setting a three-year limit to file malpractice actions based upon date of injury).

The Supreme Court, in *Cummings*, also recognized that, to achieve the legislative goal, the statutory scheme offered benefits to qualified health care providers in exchange for their compliance with the requirements of the MMA. *Cummings*, 1996-NMCA-015 at ¶¶ 27-30, 121 N.M. at 830. *Cummings* noted that this quid pro quo is a common arrangement between a governmental regulatory agency and the entities that it regulates. *Id.* at ¶ 27, 121 N.M. at 830. Thus, as "incentives to assure participation by health care providers in the burdens of qualification under the Medical Malpractice Act," the Legislature offers qualified health care providers "certain benefits that are not available to those who are not qualified," and thereby "furthers its stated goal of assuring adequate malpractice insurance coverage in the New Mexico medical profession." *Id.* at ¶¶ 29-30, 121 N.M. at 830. Among the benefits to which qualified health care providers are entitled are the prohibition on assignment, NMSA 1978 § 41-5-12, and the assurance that no claim will be brought after the expiration of the three-year statute of repose. NMSA 1978, § 41-5-13.

Thus, in enacting the MMA, the legislature intended to create predictability in medical malpractice cases by comprehensively governing medical malpractice

claims in New Mexico. To further that legislative intent, *Wilschinksy*, *Christus St. Vincent* and *Baker* make it clear that a claim brought by a patient is not the only type of claim covered by the MMA. *Christus St. Vincent*, 2011-NMCA-112 at ¶ 15, (claim for indemnification considered a "malpractice claim" under the MMA); *see supra Wilschinsky,* 989-NMSC-047, ¶ 20 (holding that where a patient caused the injury to a third-party, the injured third-party's claim against the patient's doctor falls within the purview of the MMA). Concomitantly, Section 41-5-12, as part of the MMA, must also apply to more than just a claim brought by a patient.

Prohibiting assignments of malpractice claims is a reasonable limitation. Assignments are always made by a party less likely to pursue the claim to a party who is more likely to pursue the claim.

Assignments can completely change the character of the claim. This case is a perfect example. The Hospital, who denied that Dr. Gerety was negligent and denied vicarious liability for any negligence by Dr. Gerety, has sold its claim to the grieving family of the patient. The Hospital, whose physicians, nurses, and administrators were all accused of their own negligence, is a non-party and the grieving family, who is blameless, is now the party suing Dr. Gerety.

An assignment can be used to manipulate venue. If a hospital/indemnitee can assign its claim to a wrongful death personal representative (as in this case), then the physician can be sued for indemnity anywhere in the state. Here, a claim

that should be between an Albuquerque hospital and an Albuquerque doctor is pending in Las Vegas.

An assignment changes the dynamics of discovery. The Hospital, which is no longer a party, is not required to answer interrogatories, requests for admissions, or requests for production about its own responsibility for the death of its patient – which is a pivotal issue in a claim for equitable indemnity. The extent to which the Hospital may be able to assert immunities and privileges in depositions may also be impacted by the fact that the Hospital is no longer the claimant against Dr. Gerety and NMHI.

Assignments of malpractice claims render such claims a commodity that can be purchased by anyone. Health care providers who have been responsible enough to participate in the insurance framework established by the MMA should be protected from the commercialization of malpractice litigation.

No reasonable basis exists for treating assignments of malpractice claims of hospitals different than malpractice claims of patients. In the words of the *Baker* opinion: "we can discern no reason why the legislature would intend to [prohibit assignments of malpractice claims by patients] while [allowing assignments of malpractice claims by hospitals or injured motorists]. *Baker*, 2013-NMSC-043 at ¶ 40. In the words of the *Christus St. Vincent* opinion: "To permit [Hospital's assigned] claim to proceed where [an assignment by Mr. Thoemke would be

prohibited] would, in our view, elevate form over substance and frustrate the underlying concerns which motivated our legislature to enact the MMA...." 2011-NMCA-112 at ¶ 16. The uncertainty, unpredictability, and expansion of litigation that Section 41-5-12 sought to prevent is equally, if not more, present where assignments are made by hospitals as where they are made by patients.

As a health care provider, Dr. Gerety is entitled to rely on Section 41-5-12, ensuring that no medical malpractice claim made against him can be assigned to someone else to pursue. NMSA 1978, § 41-5-12. That benefit should not be contingent upon who brings the medical malpractice claim. Such an interpretation of the MMA would leave qualified health care providers vulnerable to assignment of claims made against them in all instances where a non-patient had made the claim, which violates the purpose and spirit of the MMA.

II. Enforcement of the assignment is prohibited by the MMA's statute of repose and the prerequisite for a commission decision.

Appellee, as personal representative of the Estate of Daniel Thoemke, deliberately chose not to sue Dr. Gerety or NMHI. The personal representative now wants to sue Dr. Gerety and NMHI, pursuant to the assignment of the Hospital's indemnity claim. Allowing him to do so violates the clear intent of the statute of repose in the Medical Malpractice Act. NMSA 1978 § 41-5-13 (1976).

Appellee not only chose not to sue Dr. Gerety or NMHI in the main action, he persuaded the Court to sever the indemnity claim against Dr. Gerety, which barred them from participating in discovery or the trial. Having made those deliberate choices, Appellee should not be permitted to initiate a medical malpractice claim, more than a year after the expiration of the statute of repose. If Appellee wished to sue Dr. Gerety or NMHI, he should have asserted a claim within the statute of repose, rather than pursue a back-door, stale claim against them in clear violation of the intent of the Medical Malpractice Act. NMSA 1978 § 41-5-13 (1976) ("[n]o claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act may be brought against a healthcare provider unless filed within three years after the date of the act of malpractice occurred...This section applies to all persons regardless of minority or other legal disability").

Furthermore, claimants are required to submit an application to the medical review commission and obtain a decision before filing a complaint under the Act. NMSA 1978, § 41-5-15 (1976). However, Appellee made no such application regarding his claim against Dr. Gerety and NMHI. Appellee should be barred by this failure, and no provision in the Act grants to Appellee an excuse for his non-compliance.

III. Enforcement of the assignment would contravene the public policy prohibiting the assignment of claims for personal injury.

Even if the Court were to determine that the MMA itself did not prohibit the assignment, the common law prohibits the assignment. New Mexico common law prohibits the assignment of a cause of action for personal injury. *See Quality Chiropractic PC v. Farmers Ins. Co. of Ariz.*, 2002-NMCA-080, ¶ 30, 132 N.M. 518 ("[t]he rule prohibiting assignment of personal injury claims is well rooted in the common law...Clearly, if the courts began enforcing the assignment of personal injury claims, the use of such assignments would increase...We think the best course of action, unless and until the legislature acts, is to maintain the rule prohibiting the assignments of personal injury claims"). The main concern in prohibiting such assignments was that "the assignment of personal injury claims would lead to unscrupulous trafficking in litigation as a commodity." *Id.* at ¶ 10 (further concern was practices of champerty and maintenance, the possibility of harassment by the purchaser, and that the purchaser would have a strong motive to pursue a claim that the assignor, thereby increasing the burden on the defendant).

The Hospital's claim for equitable indemnity arises from the common law, not from the statute itself or from contract. *See Christus St. Vincent*, 2011-NMCA-1122 at ¶¶ 14-15. The claim is a medical malpractice claim for bodily injury. *Id.* at ¶¶ 15-18; *see also Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Joint Underwriting Assoc.*, 713 S.E.2d 639,

641 (S.C. Ct. App. 2011) (finding that a hospital's indemnity action was an action to recover damages for injury to the person). Even if the MMA did not prohibit the assignment of the malpractice claim against Appellants, the common law of New Mexico does.

CONCLUSION

The Legislature clearly intended that the MMA be applied broadly to help curb the unpredictability of medical malpractice claims. The Courts have consistently honored the Legislature's intent by harmonizing the specific language of the MMA with the intended purpose of the Act. In doing so, the Courts have rejected a strict and narrow construction of the MMA in favor of a construction that implements that the limitations and benefits of the MMA. When health care providers comply with the insurance requirements in the MMA, the "quid pro quo" of the limitations on claims should be enforced. The district court's order denying Appellants' Motion to Dismiss should be reversed.

WHEREFORE, Appellants respectfully request that the Court reverse the district court and remand the matter for entry of an order granting Appellants' Motion to Dismiss.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Oral argument is proper in the case to give the parties an opportunity to discuss with the Court the legislative intent of the MMA and the public policy implications of allowing assignments of medical malpractice claims.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 12-307 NMRA, the foregoing BRIEF IN CHIEF was served on the following on February 24th, 2017, by the method reflected:

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